



Christopher J. Malik, the physician who had been treating claimant for an earlier injury he sustained while working for another employer.

Respondent has appealed and alleges the ALJ erred in finding claimant sustained an accidental injury arising out of and in the course of his employment. Respondent further alleges the ALJ erred in failing to specify the extent of claimant's treatment as it maintains "not all of [c]laimant's medical conditions are causally related to the accident of February 13, 2004."<sup>2</sup>

Claimant requests the ALJ's preliminary hearing Order be affirmed in all respects.

The issues to be determined are as follows:

1. Whether claimant sustained an accidental injury arising out of and in the course of his employment with respondent on February 13, 2004; and
2. Whether the ALJ erred in ordering treatment with Dr. Malik.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

At the first hearing, it was uncontroverted that claimant sustained a prior work-related injury to his right hand. He had been diagnosed with reflex sympathy dystrophy (RSD), although at least one medical examiner has questioned that diagnosis. His care related to that injury was ongoing and he had seen his treating physician, Dr. Malik, as recently as February 3, 2004. Dr. Malik's records include rather serious complaints of pain which required ongoing medications. In spite of this injury, claimant was able to do his work, albeit with some lifting restrictions.

At that hearing, claimant testified he injured his right hand, specifically his right ring finger, while carrying a carpet cleaning machine on February 13, 2004. He testified this accident happened when he and a co-worker, Donald Dolina, were carrying the machine down a set of steps. Mr. Dolina denies helping claimant in this manner and further denies this accident happened, or that claimant complained of any resulting injury. In fact, other than claimant's testimony, there was no independent corroboration of this accident at the first hearing. Accordingly, the ALJ denied claimant's request for weekly benefits and medical treatment.

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<sup>2</sup> Application for Review at 1.

A second preliminary hearing was held and additional evidence was offered. At this hearing, claimant offered the testimony of his former supervisor, Reginald Ballard, who testified that claimant contacted him on February 13, 2004 via telephone and notified him that he sustained an injury while carrying a carpet cleaning machine. Mr. Ballard is no longer employed by respondent and was, in fact, replaced by Mr. Dolina. Claimant testified that Mr. Ballard referred him to the emergency room for his injury.

For whatever reason, Mr. Ballard's testimony was not offered at the first preliminary hearing. However, it is clear from the ALJ's preliminary hearing Order that Mr. Ballard's corroborating testimony was sufficient to persuade the ALJ that claimant sustained an accidental injury arising out of and in the course of his employment on February 13, 2004. While there is testimony from two of respondent's present employees denying the existence of an accident, Mr. Ballard's testimony is, for the most part, consistent with that given by claimant.

The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant on two occasions as well as respondent's representatives. In denying claimant's request for medical treatment and temporary total disability benefits following the first hearing, the ALJ apparently believed their testimony over the claimant's. Yet, he found to the contrary when presented with Mr. Ballard's testimony. Under these facts the Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Accordingly, the ALJ's conclusion that claimant has met his evidentiary burdens with respect to accidental injury arising out of and in the course of his employment with respondent is affirmed.

K.S.A. 44-534a grants authority to an Administrative Law Judge to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary disability compensation. The preliminary hearing statute found at K.S.A. 44-534a gives the Administrative Law Judge authority to grant or deny the request for medical compensation pending a full hearing on the claim. Thus, the Administrative Law Judge did not exceed his jurisdiction and the Board does not have jurisdiction to review the Judge's preliminary findings regarding medical compensation nor in failing to limit the scope of the physician's treatment.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.<sup>3</sup>

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated October 7, 2004, is affirmed.

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<sup>3</sup> K.S.A. 44-534a(a)(2).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2004.

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BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant  
Clinton D. Collier, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director